Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term 1993

THEVARATHANTHRIGAE NIHAL GUNAWANSA,
Petitioner,

v.

U.S. IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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June 8, 1994

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33pp

QUESTIONS PRESENTED

1. Does the 1990 Amendment to Sec. 243(h) of the INA, 8 USC 1253(h) creates an absolute bar to withholding of deportation for one convicted of an aggravated felony?

2. Has the petitioner met the standards for a determination that he should be classified as a refugee under Sec 101(a)(42)(A) of the INA, 8 USC 1101(a)(42)(A)?

LIST OF PARTIES TO THE PROCEEDING

A LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGEMENT IS SOUGHT TO BE REVIEWED

Thevarathanthrigae Nihal Gunuwansa

U.S. Immigration and Naturalization Service

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REPORTS OF OPINIONS

Matter of Thevarathanthrigae Nihal Gunawansa, A16058008 (BIA, Dec. 28, 1992), unreported.

Thevarathanthrigae Nihal Gunawansa v. US INS, No. 93-1807 (4th Cir., Mar. 11, 1994), unreported.

GROUNDS ON WHICH JURISDICTION IS INVOKED

Date of entry of judgment of Court of Appeals: March 11, 1994.

Date of order denying petition for rehearing: April 5, 1994.

The Jurisdiction of the Supreme Court to review the judgment of the US Court of Appeals is conferred by Art. III, Sec. 2 of the US Constitution and 28 USC 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS.

8 USC 1253(h), as amended, reads:

> (h)(1)[24] The Attorney General shall not deport or return any alien (other than an alien described in section 241(a)(4)(D)) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.
>
> (2) paragraph (1) shall not apply to any alien if the Attorney General determines that—
>
> > (A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
> >
> > (B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
> >
> > (C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

---

[24]As amended by Sec. 603(b)(3 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978, Sec. 603(b), pertaining to deportation grounds, is not applicable to deportation proceedings where notice was given to the alien prior to March 1, 1991.

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.[25]

For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.

8 US 1101(a)(42)(A), as amended, reads:

(42)[44]The term "refugee" means

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or . . . .

---

[25]As originally enacted this subsection dealt with aliens who would be subject to "physical persecution." The Act of Oct. 3, 1965, 79 Stat. 918 substituted "persecution on account of race, religion, or political opinion" for "physical persecution." This subsection was extensively revised by Sec. 203(e), Refugee Act of 1980, enacted Mar. 17, 1980, Pub.L. No. 96-212, 94 Stat. 107. The last sentence of subpar. (h)(2), indicating that an alien convicted of an aggravated felony is considered to have committed a "particularly serious crime", was added by Sec. 515(a)(2) of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978. This addition is effective on the date of enactment of the Immigration Act of 1990 (Nov. 29, 1990), and is applicable to convictions entered before, on, or after the date of enactment. A further amendment, by Sec. 306(a)(13) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Act of Dec. 12, 1991, Pub. L. No. 102-232, 105 Stat. 1733, provided that the sentence applies to applications for withholding of deportation made on or after Nov. 29, 1990.

II. THE PETITIONER HAS MET THE RELEVANT STANDARDS FOR A DETERMINATION THAT HE SHOULD BE CLASSIFIED AS A REFUGEE UNDER 8 USC 1101(a)(42)(A).

The Court of Appeals opinion denying Petitioner's Motion to Reopen is bottomed on a threshold determination that Petitioner cannot meet the statutory definition of a refugee, and therefore canot qualify for a grant of political asylum under 8 USC 1158(a) or for withholding of deportation under 8 USC 1253(h). This determination is erroneous, even using the Court of Appeals' own standard as enunciated in *M.A. A26851062 v. INS*, 899 F.2d 304, 311 (4 Cir. 1990), which states an applicant must show:

> (1) that a reasonable person in the circumstances would fear persecution, and
>
> (2) that the fear has "some basis in the reality of the circumstances" and is validated with "specific concrete facts".

Petitioner here is certainly a reasonable person, and his fear of persecution by the armed and violent rebel factions in his home country of Sri Lanka is a real, substantial and comprehensible one. The Court of Appeals opinion concurs with the Board of Immigration Appeals' decision that Petitioner "failed to demonstrate that a reasonable person in his circumstances would fear persecution on account of race, religion, nationality, memberhsip in a particular social group, or political opinion".

Petitioner's claim to the Board of Immigration Appeals was based upon certain facts not disputed by the Immigration and Naturalization Service: Petitioner is a member of the Sinhalese ethnic group, represented by the UNP political party; Petitioner is engaged in anti-Tamil (the rival faction both ethnically

and politically in Sri Lanka's civil war) during the period 1978-1985; that he co-operated with the U.S. government authorities in securing the conviction of the brother of a prominent member of the JVP (the Janatha Vimukthi Peramuna). The JVP has actively persecuted petitioner due to his previous activities on behalf of the United Peoples Party (the democratically elected, centrist party which comprises the legitimate government of Sri Lanka), to the degree that JVP members shot up petitioner's house in 1989, killing several friends of his (See BIA decision at p.2.)

The Motion to Reopen to the Board of Immigration Appeals was accompanied by affidavits and exhibits verifying these facts, which were not presented at Petitioner's deportation hearing because of ineffective assistance of counsel, a due process question which will be discussed *infra*.

The Board of Immigration Appeals denied Petitioner's Motion despite these facts, calling his fear of the militant Tamils "speculative", and his fear of the JVP "personal", not political. In essence, the Board of Immigration Appeals decided that Petitioner's fears were ***unreasonable***, because he did not establish that the Tamils knew of his activities from 1978-1985, and because he did not establish that the JVP sought to do him harm because he was Sinhalese, but because of personal animosity.

It is difficult to characterize the conclusions drawn by the Board of Immigration Appeals, and blithely concurred in by the Court of Appeals, as other than fatuous. The affidavits and exhibits submitted with the Motion are "concrete" and "specific", as *M.A.* requires, and they are uniform in their showing that Petitioner entertains a reasonable fear of persecution precisely ***because he is anti-Tamil***, and ***pro-Sinhalese***.

Petitioner does indeed belong, as the Court and the Board of Immigration Appeals note, to the ethnic group that comprises the majority of Sri Lankans, and to which the majority of deputies and the President of Sri Lanka belong. What is ignored in both opinions, however, is the fact that it is an ethnic group struggling to save itself from Tamil insurrection, and utterly powerless to protect its members from such outrages as those perpetrated by the Tamils on Petitioner's family.

The law is clear on the point that a well founded fear of persecution need not be based upon a fear of *government* persecution. The fear can arise from persecution from rebels as well.

It is almost impossible to understand how someone whose parents' business was sacked by Tamil rebels and who worked himself against them for seven years could entertain a fear that was "speculative". Neither the Board of Immigration Appeals opine on why the Tamils attacked Petitioner's family's bus company, an uncontradicted fact in his proffered evidence. Do they believe that this, too, was "personal"? The subsequent invasion of his house by Tamil rebels in 1989, also uncontradicted was also dismissed as speculative, because there was no showing that the Tamils knew Petitioner was working against them. The Board of Immigration Appeals does not speculate as to why the Tamils chose *Petitioner's* house to attack, rather than someone else's if they had no interest in Petitioner's activities.

The Immigration and Nationality Act does not require that an applicant for asylum prove his likelihood of persecution beyond a reasonable doubt; it requires only that he show his fear is "well-founded". The *M.A.* referred to above defines "well-founded fear," and Petitioner has met his burden under that standard.

For the present panel to ignore that fact, and to pronounce on the point not as an issue of statutory interpretation but as an *evidentiary* matter, is not an act readily understandable by present Counsel. This issue is solely a quest of law, and thus, the Court of Appeals' review as plenary. See *Campos v. INS*, 961 F.2d 309, 312 (First Cir. 1992); *Ardestani v. INS*, 904 F.2d 1505, 1508, 11th Cir. 1990, aff'd 116 L. F.2d 496, 112 S. Ct. 515 (1991); *de los Santos v. INS*, 690 F.2d 56, 59 (2nd Cir. 1982). The "substantial evidence" standard of *INS V. Elias-Zacarias*, 60 USLW 4130 (U.S. 1992), embraced here by the Court of Appeals, has nothing whatsoever to do with whether or not Congress intended a statute to be applied retroactively.

The Court should, if on this ground alone, remand this case to the Court of Appeals with instructions to await an *en banc* ruling on the identical issue as presented in *Kofa, supra.*

Respectfully submitted,

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Re: 93-1807 Gunawansa v. INS
A16-058-008

Dear Counsel:

Enclosed is a copy of an order filed 4/5/94, denying the petition for rehearing and suggestion for rehearing in banc.

Yours truly,

BERT M. MONTAGUE
Clerk

By: /s/ Amy M. Church
Deputy Clerk

cc: Robert Yeargin
Robert Leigh Bombaugh
David John Kline

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 5, 1994

No. 93-1807
A16-058-008

THEVARATHANTHRIGAE NIHAL GUNAWANSA
Petitioner

v.

U.S. IMMIGRATION & NATURALIZATION SERVICE
Respondent

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-1807

THEVARATHANTHRIGAE NIHAL GUNAWANSA,
Petitioner,

v.

U.S. IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

On Petition for Review of an Order of the
Immigration and Naturalization Service.
(A16-058-008)

Submitted: February 24, 1994

Decided: March 11, 1994

Before MURNAGHAN and WILKINS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Donald L. Schlemmer, Washington, D.C., for Petitioner. Frank W. Hunger, Assistant Attorney General, Richard M. Evans, Assistant Director, Office of Immigration Litigation, Ellen Sue Shapiro, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Thevarathanthrigae Nihal Gunawansa ("Petitioner"), a citizen of Sri Lanka, appeals from a Board of Immigration Appeals ("the Board") order that denied his requests for asylum and withholding of deportation, and his motion to reopen. Because we find that substantial evidence from the record as a whole supports the Board's denial of asylum and withholding of deportation and that the Board did not abuse its discretion in denying Petitioner's motion to reopen, we affirm the Board's order.

Petitioner was first admitted to the United States as a non-immigrant crewman in 1985, and illegally remained in this country after his ship departed. In 1987, Petitioner was convicted of conspiracy with intent to distribute heroin and was sentenced to five years imprisonment. He was charged with deportability based upon both his overstay in the United States and his criminal conviction.

Petitioner filed an application for asylum and alleged that he was afraid to return to Sri Lanka because he believed he would be the victim of violent attacks from certain militant groups due to his political activities and because he cooperated with the United States government in convicting another Sri Lankan whose brother was a member of a militant group in Sri Lanka. After numerous delays, the immigration judge found Petitioner ineligible for asylum or withholding of deportation. Petitioner appealed that decision to the Board and moved for remand due to ineffective assistance of counsel while his appeal

was pending with the Board. The Board denied relief and Petitioner appealed.[1]

This Court must uphold the Board's decision if it is supported by substantial evidence from the record as a whole. *INS v. Elias-Zacarias*, 60 U.S.L.W. 4130, 4131 (U.S. 1992). This Court can reverse the Board only if the evidence presented by Petitioner "was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Id.* at 4132.

Under 8 U.S.C.A. § 1158(a) (West. Supp. 1993), the Attorney General has discretion to grant an alien political asylum if the Attorney General determines the alien is a refugee within the meaning of 8 U.S.C.A. § 1101(a)(42)(A) (West. Supp. 1993), which states that a refugee is any person who is unable to return to his country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . ." The standard for proving a "well-founded fear of persecution" is the "reasonable person test." *M.A. A26851062 v.INS*, 899 F.2d 304, 311 (4th Cir. 1990) (en banc). An individual seeking asylum under this standard must show:

(1) that a reasonable person in the circumstances would fear persecution; and

(2) that the fear has "some basis in the reality of the circumstances" and is validated with "specific, concrete facts."

Id. Petitioner must also show that his fear of persectuion stems directly from one of the five categories of persecution listed in § 1101. If eligibility under the statute is established, there

[1]Petitioner filed his Petition for Review in the Court of Appeals for the District of Columbia Circuit, which transferred the petition to this Court.

is then a discretionary determination concerning asylum by the Attorney General. *Diaz-Escobar v. INS*, 782 F.2d 1488, 1491 (9th Cir. 1986).

The Board determined that Petitioner failed to demonstrate that a reasonable person in his circumstances would fear persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The Board noted that Petitioner is a member of the ethnic group that comprises the majority of Sri Lankans and that he and his family are members of the political party to which the country's president and the majority of the country's parliament belong. The Board continued that Petitioner's fear of harm by militant Tamils is speculative and that his fear of retaliation from another militant group is based on personal animosity, not political concerns. The Board also found that Petitioner failed to establish a well-founded fear of persecution merely on the basis of living in the political unrest of Sri Lanka. Because the Board found that Petitioner failed to establish his statutory eligibility for asylum, it properly did not address whether he merited such relief as a matter of discretion.

We find that substantial evidence in the record as a whole supports the Board's decision to deny Petitioner asylum. Though Petitioner asserts that he engaged in anti-Tamil activities between 1978 and 1985, he does not establish that the Tamils knew of his participation in such activities or that they actually threatened or harmed him in any way. Petitioner fears reprisal from members of the "JVP," another Sri Lankan militant group, because his cooperatin with the United States government led to the conviction of a Sri Lankan whose brother allegedly is a powerful member of the JVP. As the Board determined, even if members of the JVP seek to harm Petitioner, he has not established that the threat of harm is based on his race, religion, nationality, membership in a particular social group, or political opinion.

In order to qualify for withholding of deportation, Petitioner must prove a probability of persecution, a more stringent standard than a well-founded fear of persecution. 8 U.S.C.A. § 1253(h) (West. Supp. 1993); *Huaman-Cornelio v. Board of Immigration Appeals*, 979 F.2d 995, 1000 (4th Cir. 1992). The Board's determination that Petitioner did not meet the asylum standard necessarily means that he did not meet his burden on his more difficult withholding of deportation claim. *Id.* (citations omitted).

The Board also found that Petitioner was ineligible for withholding of deportation because of his criminal conviction for his participation in a drug conspiracy with intent to distribute heroin. Withholding of deportation is not available to an alien who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States. 8 U.S.C.A. § 1253(h)(2)(B) (West Supp. 1993). Since substantial evidence in the record as a whole supports the Board's order concerning denial of withholding deportation on this basis, we affirm the Board's order in that regard. The board properly rejected petitioner's argument that his deportation would constitute a violation of international law. *See Matter of Medina*, 19 I&N Dec. 734 (BIA 1988).

Petitioner alleges that he was denied due process because he received ineffective assistance of counsel in relation to his application for asylum. He asserts that his attorney failed to submit a number of documents in support of his application for asylum and failed to properly present a requested witness at his hearing.

Whether alleged ineffective assistance of counsel rises to the level of a due process violation presents a mixed question of law and fact, and is therefore subject to de novo review. *Figeroa v. INS*, 886 F.2d 76, 78 (4th Cir. 1989). To prevail on a claim of ineffective assistance of counsel at a deportation

proceeding, Petitioner must establish not only ineffective representation, but also prejudice to him that resulted from counsel's ineffective performance. *Id.*

The Board determined that even if Petitioner established that he received ineffective assistance of counsel, he was not prejudiced by the lawyer's performance because even when the record is considered with the evidence that Petitioner sought to present, he fails to establish a prima facie case for asylum. As the Board noted, evidence concerning general conditions in Sri Lanka was insufficient to establish a well-founded fear of persecution, letters and statements from others in Sri Lanka only corroborated Petitioner's testimony and did not "add new information," there was still no evidence that militant Tamils sought to harm Petitioner because of his political activities, and his claims in regard to the JVP were still meritless because they "are looking for him for personal reasons." The Board noted that Petitioner's evidence concerning his performance while incarcerated and his activities since his release are relevant only to discretionary asylum and need not be considered since he failed to establish asylum under the statute. Since, as the Board found, Petitioner was not prejudiced by the performance of his counsel at his asylum hearing, his due process claim of ineffective assistance is meritless.

This Court reviews the Board's denial of a motin toreopen based on an alien's failure to establish prima facie eligibility for asylum under an abuse of discretion standard. *M.A.*, 899 F.2d at 308. Denial of a motion to reopen "must be reviewed with extreme deference" since immigration statutes do not contemplate reopening and the applicable regulations disfavor motions to reopen. *Id.* Since, as previously discussed, Petitioner's claim of ineffective assistance is meritless and since substantial evidence supports the Board's denials of

asylum and of withholding of deportation, the Board did not abuse its discretion in denying Petitioner's motion to reopen.

For these reasons, we affirm the Board's order. We deny Petitioner's motion for oral argument in this Court because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.[2]

AFFIRMED

[2]We also deny Petitioner's "Motion for Enlargement on Bond Pendente Lite."

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

Chairman

Dec. 28, 1992

David L. Schlemmer, Esquire
1512 Pennsylvania Avenue, S.E.
Washington, DC 20003

THEVARATHANTHRIGAE NIHAL *GUNAWANSA*
A16 058 008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Very truly yours,

David L. Milhollan
Chairman

Enclosure

Panel Members:
DAVID L. MILHOLLAN
JAMES P. MORRIS
FRED W. VACCA

DECISION OF THE BOARD OF IMMIGRATION APPEALS
U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Date: Dec 28, 1992

File: A16 058 008 — Baltimore
In re: THEVARATHANTHRIGAE NIHAL *GUNAWANSA*

IN DEPORTATION PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT:
David L. Schlemmer, Esquire
1513 Pennsylvania Avenue, S.E.
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ON BEHALF OF SERVICE: Harriett J. Cohen
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] - Nonimmigrant - remained longer than permitted

Lodged: Sec. 241(a)(11), I&N Act [8 U.S.C. §1251(a)(11)]- Convicted of controlled substance violation

APPLICATION: Asylum; withholding of deportation

ORDER:

PER CURIAM. In a decision dated May 14, 1992, the immigration judge found the respondent deportable on the charges set forth above, denied his applications for asylum and

withholding of deportation under sections 208 and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1253(h), and ordered him deported from the United States to Sri Lanka. The respondent filed a timely appeal. While that appeal was pending, the respondent submitted a motion to reopen to consider additional evidence regarding his persecution claim. The immigration judge's decision is affirmed and the motion to reopen is denied. The request for oral argument before the Board is denied.

The respondent is a 35-year-old married, male native and citizen of Sri Lanka. He has not satisfied the well-founded fear standard of eligibility required for asylum under section 208 of the Act. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). He has not demonstrated that a reasonable person in his circumstances would fear persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

The respondent is a member of the Sinhalese ethnic group, the ethnic group of the majority of Sri Lankans. He and his parents have long been members of the United National Party (UNP), the party to which the President of Sri Lanka and a majority of the members of the Parliament belong. The respondent was never detained, interrogated, convicted and sentenced, imprisoned, or mistreated by authorities in Sri Lanka. on his last departure from Sri Lanka, he had exit permission and a valid passport which he obtained himself.

The respondent's assertion of a fear of harm by militant Tamils is speculative. He advised that he distributed anti-Tamil political writings, spoke out against Tamils on the Greek merchant ships on which he was employed intermittently between 1978 and 1985, and arranged for transportation for UNP members who traveled from his town to Colombo to burn

Tamil properties or during the riots of July 1983. It has not been established, however, that Tamil militants are aware of these activities or have been looking for him because of them. The respondent's testimony that two unknown men came to his house once asking for him is insufficient to demonstrate that he is being sought by Tamil militants. In addition, although the repondent's father had one of his businesses destroyed during the July 1983 riots, the circumstances of the destruction have not been shown to establish the respondent's claim. The respondent has not explained the basis for his belief that Tamils deliberately set the business on fire, nor has he shown that those who burned his father's business during this period of wide-spread violence and destruction did so in order to punish the respondent for his anti-Tamil activities. The respondent did not report any further incidents during the time he remained in Sri Lanka until his last departure in February 1985.

The respondent also bases his claim on a fear of harm by members of a militant Sinhalese group, the Janatha Vimukthi Peramuna (JVP). He explained that after his arrest in the United States on drug charges, he cooperated with the government in return for a recommendation of a reduced sentence. He said that he identified and helped to convict his codefendant, a Sri Lankan whose brother was a powerful member of the JVP. According to the respondent, his codefendant subsequently beat him up in prison and threatened that his brother would kill the respondent's whole family. A report in the record from the Kelaniya Police Division reflects that on February 8, 1988, JVP gunmen did attack a rental property owned by the respondent and his family, killing two of the tenants and wounding three others. In addition, the respondent testified that shortly after he was released from prison in the United States, men approached one of his relatives in Sri Lanka looking for him and told the relative that they knew the respondent was coming back soon. Even if these JVP members are

still seeking the respondent[1] it has not been shown that their interest in him is on account of his race, religion, nationality, membership in a particular social group, or political opinion. Indeed, they and the respondent probably share the same race, religion, nationality, and anti-Tamil political opinion. Instead, it seems clear that their interest in the respondent is strictly personal, in order to get revenge against him for helping officials convict a JVP member's brother on drug charges. Such a claim does not qualify the respondent for asylum. *See Matter of Pierre*, 15 I&N Dec. 461 (BIA 1975).

In addition, the respondent has not established a well-founded fear of persecution merely on the basis of living in the volatile political climate of Sri Lanka. Conditions of political upheaval which affect the populace as a whole are insufficient to establish an alien's eligibility for asylum. *See Sarvia-Quintanilla v. INS*, 767 F.2d 1387 (9th Cir. 1985); *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982); *Matter of Sanchez and Escobar*, 19 I&N Dec. 276 (BIA 1985), *aff'd sub nom. Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

Because we have found that the respondent has failed to establish his statutory eligibility for asylum, we need not address whether he merits that form of relief as a matter of discretion. Moreover, inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he has also failed to satisfy the clear probability standard of eligibility required for withholding of deportation. *See Matter of Mogharrabi, supra*. The evidence does not establish that it is more likely than not that the respondent would be subject to persecution on account of one of the five

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[1]We are aware that the JVP has been suppressed by the Government of Sri Lanka. *See e.g. Matter of T-*, Interim Decision 3187 (BIA 1992). Nevertheless, we are assuming arguendo that the codefendant's brother and his companions may still maintain their personal vendetta against the respondent outside the auspices of the JVP.

grounds specified in section 243(h) of the Act. *See INS v. Stevic,* 467 U.S. 407 (1984).

We further find that the respondent is also statutorily ineligible for withholding of deportation on another basis: his May 27, 1987, conviction in the United States District Court of the Eastern District of Louisiana of conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and 846. Withholding of deportation is not available to an alien who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States. Section 243(h)(2)(B) of the Act, 8 U.S.C. §1253(h)(2)(B). The respondent's conviction of conspiracy to possess with intent to distribute heroin involves drug trafficking. An alien convicted of trafficking in drugs has been convicted of a particularly serious crime, representing criminal behavior which constitutes a danger to the community. *Matter of U-M-,* Interim Decision 3152 (BIA 1991); *Matter of Gonzalez,* 19 I&N Dec. 682 (BIA 1988).

On appeal, the respondent argues that his deportation would be a violation of international law. We reject this argument for the reasons discussed in *Matter of Medina,* 19 I&N Dec. 734 (BIA 1988).

The respondent also argues on appeal that his former counsel provided ineffective assistance. He develops this issue further in his motion to reopen. In that motion, the respondent alleges that he was deprived of due process because his former counsel did not competently or adequately document his asylum application. He contends that his former counsel failed to submit a number of supportive documents which would have greatly enhanced his testimony and substantiated his credibility, even though he had supplied his former counsel with such documentation. He also argues that his former counsel failed to provide to the court available documentation showing

rehabilitation and favorable equities which had a bearing on his request for the discretionary relief of asylum.

In support of his motion, the respondent has submitted numerous documents. They include his own affidavit in which he avers that he was introduced by a friend to his former counsel on June 21, 1990. He says that at that meeting he gave his former counsel supporting documentation for his asylum application and told him he wanted his friend to testify at his hearing. He states that his former counsel agreed to submit the documents into evidence, to use his friend as a witness, and to make all the arrangements to enable his friend to testify. The respondent asserts that at the hearing his witness was not permitted to testify, apparently because proper arrangements had not been made with the court for him to do so.

The respondent has also furnished a signed statement from his former counsel admitting that he failed to present at the respondent's hearing a witness and documentary evidence provided by the respondent. Former counsel further asserts that the respondent was prejudiced by his performance.

In addition, the respondent has submitted an affidavit from the friend whom his former counsel did not call as a witness. This friend states that he knew the respondent and his family; that he knows that the respondent's house was "shot up by Tamil terrorists and the JVP communist party," killing two people and wounding others; that the respondent's parents and siblings have told him that they currently receive threats because of the respondent; that in a recent trip to Sri Lanka he saw violence taking place just a few blocks from the respondent's house; that he has personal knowledge of human rights abuses in Sri Lanka and of the respondent's rehabilitation since his release from prison; and that he was present when the respondent and his former counsel agreed to have him called as a witness.

The other documents provided in support of the motion are presumably the documents which the respondent wanted his former counsel to submit in support of his asylum application. They include newspaper articles on background conditions in Sri Lanka, a copy of the essay about the civil war in Sri Lanka wich the respondent wrote while in prison, and letters and statements from several clergymen and other community leaders in Sri Lanka about the respondent's political activities and general good character. He has also provided documents about his performance in prison and his business and personal activities since his release from prison.

We treat a motion to reopen filed while an appeal is pending as a motion to remand. *See Corado Rodriguez v. INS*, 828 F.2d 622 (9th Cir. 1987). The standards governing motions to reopen are applicable to motions to remand. *Id.* A motion to reopen will not be granted unless a prima facie case of eligibility for the relief sought has been established. *INS v. Abudu*, 485 U.S. 94 (1988); *INS v. Wang*, 450 U.S. 139 (1981); *Matter of Martinez-Romero*, 18 I&N Dec. 75 (BIA 1981), *aff'd*, 692 F.2d 595 (9th Cir. 1982); *Matter of Rodriguez-Vera*, 17 I&N Dec. 105 (BIA 1979); *Matter of Lam*, 14 I&N Dec. 98 (BIA 1972); *see Matter of Sipus*, 14 I&N Dec. 229 (BIA 1972). In addition, motions to reopen will not be granted unless it appears that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. 8 C.F.R. § 3.2. The grant or denial of a motion to reopen is itself strictly discretionary. *INS v. Abudu, supra; INS v. Rios-Pineda*, 471 U.S. 444 (1985); *Matter of Reyes*, 18 I&N Dec. 249 (BIA 1982).

Because deportation is a purely civil proceeding the respondent's complaint of ineffective assistance of counsel is grounded in the fifth amendment right to due process. *See Michelson v. INS*, 897 F.2d 465 (10th Cir. 1990); *Ramirez-Osorio v.*

INS, 745 F.2d 937 (5th Cir. 1984); *Barthold v. United States INS*, 517 F.2d 689 (5th Cir. 1975). Where the alien claims that he was deprived of due process as a result of ineffective assistance of counsel, he must establish that he was prejudiced by his representative's performance. *See Figeroa v. INS*, 886 F.2d 78 (4th Cir. 1989); *Mohsseni Behbahani v. INS*, 796 F.2d 249 (9th Cir. 1986); *Garcia-Jaramillo v. INS*, 604 F.2d 1236 (9th Cir. 1979), *cert. denied*, 449 U.S. 828 (1980), *reh'g denied*, 449 U.S. 1026 (19890).

The respondent is essentially arguing in his motion that he has material evidence to present which was previously unavailable because of the ineffective assistance of his former counsel. We conclude that the motion should be denied. Even if the respondent's former counsel rendered ineffective assistance, the respondent was not prejudiced by his performance, as the evidence which the respondent seeks to present at a reopened hearing, even considered together with the evidence already in the record, does not establish his prima facie eligibility for asylum. The evidence on background conditions in Sri Lanka does not, prima facie, establish the respondent's claim; as noted above, general conditions of political upheaval which affect the population as a whole are insufficient to establish a well-founded fear of persecution.

In addition, the letters and statements from people in Sri Lanka merely corroborate, but do not add new information to, the respondent's testimony that he was politically active in Sri Lanka and that people are looking for him. As discussed above, the respondent's account of events in his testimony is insufficient to establish his claim because the JVP members are looking for him for personal reasons, and there is no evidence that militant Tamils are aware of his anti-Tamil political opinion or are seeking him for it. The only evidence with the motion which indicates that militant Tamils have an

interest in the respondent is the affidavit from the friend whom the respondent sought to have testify at his hearing. This friend states that he knows that the respondent's house "was shot up by Tamil terrorists and the JVP communist party" and that two people in his house were killed and others wounded. This statement is inherently unbelievable, however, as the detailed police report of the incident in the record attributes the attack solely to the JVP. Finally, the evidence regarding the respondent's equities and rehabilitation are relevant in this case only with regard to the respondent's eligibility for asylum in the exercise of discretion. As the respondent has not shown, even prima facie, that he is statutorily eligible for asylum, this discretionary evidence does not need to be considered.

Accordingly, the appeal is dismissed and the motion to reopen is denied.

/s/ David L. Milhollan

FOR THE BOARD

(2)

Supreme Court, U.S.
FILED
AUG 16 1994
OFFICE OF THE CLERK

No. 93-1966

In the Supreme Court of the United States

OCTOBER TERM, 1994

THEVARATHANTHRIGAE NIHAL GUNAWANSA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals properly concluded, in light of petitioner's conviction for conspiracy to possess heroin with intent to distribute it, that petitioner was ineligible for withholding of deportation under 8 U.S.C. 1253(h)(2)(B), because he had been convicted of a "particularly serious crime" and was therefore a "danger to the community of the United States."

2. Whether the Board of Immigration Appeals properly concluded that petitioner was not eligible to receive asylum because he had not shown a well-founded fear of persecution if he were returned to Sri Lanka.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-10a) is unpublished, but the judgment is noted at 21 F.3d 422 (Table). The opinion of the Board of Immigration Appeals (Pet. App. 12a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1994. A petition for rehearing was denied on April 5, 1994. Pet. App. 3a. The petition for a writ of certiorari was filed on June 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a citizen of Sri Lanka, was admitted to the United States in February, 1985, as a non-immigrant crewman. He was authorized to remain in this country while his ship was in port, but on no account for longer than 29 days. When his ship departed that same month, he remained in the United States. Gov't C.A. Br. 3. Two years later, he was convicted in the United States District Court for the Eastern District of Louisiana of conspiring to possess heroin with intent to distribute it, in violation of 21 U.S.C. 841(a) and 846, and was sentenced to a five-year term of imprisonment. *Ibid.* The Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioner, based on his overstay and his drug convictions. *Ibid.*

On April 7, 1986, petitioner filed an application for asylum, which was automatically deemed to be an application for withholding of deportation as well. Gov't C.A. Br. 4; see 8 C.F.R. 208.3(b).[1] In support of his application, petitioner claimed that he was a member of the Sinhalese majority ethnic group in Sri Lanka, that he had spoken out against the Tamil minority ethnic group

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[1] Withholding of deportation extends the right to remain in the United States to an alien demonstrating a "clear probability of persecution" in his or her native country. See *INS* v. *Stevic*, 467 U.S. 407, 413 (1984); 8 U.S.C. 1253(h) (1988 & Supp. IV 1992). An alien is eligible for asylum, and may be granted asylum as a matter of administrative discretion, if he or she demonstrates a "well-founded fear" of persecution. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 427-428 (1987); 8 U.S.C. 1158. The "well-founded fear of persecution" standard for asylum is less rigorous than the "clear probability" standard applicable to requests for withholding of deportation. See 480 U.S. at 432-433. For this reason, the Board of Immigration Appeals always deems an alien's request for asylum to include a request for withholding of deportation.

in that country and had distributed anti-Tamil literature, that persons looking like Tamils had visited his home in Sri Lanka and had asked his family to see him, and that he had decided to come to the United States because he "was afraid of staying longer in Europe. There were too many Tamils there." See Gov't C.A. Br. 4. He described acts of violence by Tamils against Sinhalese, reprisals by the Sinhalese, and violent counterattacks by Tamil forces against Sinhalese businesses, including his father's business. See Pet. App. 13a-14a.

An advisory letter from the State Department's Bureau of Human Rights and Humanitarian Affairs, dated November 6, 1990, opposed petitioner's application for asylum. The State Department stated that petitioner is "a Sinhalese Buddhist, which constitutes the majority of the Sri Lankan population. His purported fear of Tamil militants * * * is simply not credible." Gov't C.A. Br. 5.

The immigration judge found petitioner ineligible to receive asylum. It characterized petitioner's evidence as consisting of "mostly self-serving statements * * * that are totally unsupported by any evidence in the record. * * * There's no showing that Tamils have any personal interest in [petitioner]. * * * There's no showing that the father's loss of property had anything to do with the activity of [petitioner]." Gov't C.A. Br. 8. The immigration judge also denied asylum as a matter of discretion, based on petitioner's drug conviction, and noted that, had petitioner filed his application for asylum after October, 1990, he would have been ineligible by statute for asylum because of that conviction. See *id.* at 9.

2. The Board of Immigration Appeals (Board) dismissed petitioner's appeal, concluding that petitioner

was ineligible for either asylum or withholding of deportation. Pet. App. 12a-20a. The Board noted that petitioner was a member of the majority ethnic group in Sri Lanka, and that he had never been detained, interrogated, convicted, sentenced, or mistreated by authorities there. *Id.* at 13a. The Board characterized petitioner's fear of harm by militant Tamils as "speculative," *ibid.*, noting the lack of evidence that Tamil militants were aware of petitioner's anti-Tamil activities, or that the destruction of his father's business was due to those activities, *id.* at 14a. The Board also rejected petitioner's claim of fear of harm from a militant Sinhalese group in reprisal for his cooperation with American authorities, describing that group's interest in petitioner as "strictly personal," rather than based on his race, religion, nationality, or political opinion. *Id.* at 15a. Thus, the Board concluded, petitioner had shown neither a well-founded fear of persecution nor a clear probability of persecution if he were returned to Sri Lanka. See *ibid.*

In addition, the Board concluded (Pet. App. 16a) that, because of his criminal conviction, petitioner was ineligible for withholding of deportation pursuant to 8 U.S.C. 1253(h)(2)(B). Section 1253(h)(2)(B) provides that an alien is not eligible for withholding of deportation if the Attorney General determines that "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States[.]" The Board concluded that "[a]n alien convicted of trafficking in drugs has been convicted of a particularly serious crime,

representing criminal behavior which constitutes a danger to the community." Pet. App. 16a.[2]

3. The court of appeals affirmed the Board's deportation order in an unpublished opinion. Pet. App. 4a-10a. The court first found substantial evidence in the record as a whole to support the Board's decision to deny petitioner asylum. *Id.* at 7a. In particular, the court upheld the Board's determination that petitioner had not established that Tamil militants knew of his anti-Tamil activities, or that the militants had actually threatened or harmed him in any way. *Ibid.* The court also agreed with the Board that any threats of reprisal from Sinhalese militants against petitioner because of his cooperation with American authorities could not be described as threats of harm based on his race, religion, nationality, membership in a particular social group, or

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[2] In the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, Congress amended the Immigration and Nationality Act to define the term "particularly serious crime" to include any "aggravated felony" (see § 515(a)(2), 104 Stat. 5053), which in turn was defined to include "any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act)" (see § 501, 104 Stat. 5048). Heroin is defined as a controlled substance in the Controlled Substances Act. See 21 U.S.C. 802(6) and 812(c), Schedule I(b). Thus, if petitioner's application for withholding of deportation were governed by the 1990 Act, petitioner would be guilty of a "particularly serious crime" as a matter of statutory definition. However, the pertinent amendments in the 1990 Act apply only to applications for withholding of deportation mad on or after November 29, 1990, the date of enactment of the 1990 Act. See 104 Stat. 5088 (date of President's approval of 1990 Act); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(13)(2), 105 Stat. 1752. Petitioner's application was filed before November 29, 1990.

political opinion, and thus they were irrelevant to the asylum decision. See *ibid.*

The court also upheld the Board's conclusion that petitioner was ineligible for withholding of deportation. The court noted that, since petitioner had failed to present sufficient evidence to show that he had a well-founded fear of persecution, he also had failed, *a fortiori*, to meet the more stringent standard for withholding of deportation. Pet. App. 8a. In addition, the court affirmed the Board's determination that petitioner was ineligible for withholding of deportation because he was guilty of a "particularly serious crime," stating, "Since substantial evidence in the record as a whole supports the Board's order concerning denial of withholding of deportation on that basis, we affirm the Board's order in that regard." *Ibid.*

ARGUMENT

1. Petitioner argues (Pet. 4) that he "remains eligible for a grant of withholding [of deportation] under 8 U.S.C. 1253(h)." The apparent basis for this contention is the suggestion that the court of appeals erred in not requiring the Board of Immigration Appeals to find specifically that petitioner constituted a "danger to the community of the United States." In other words, petitioner argues that the Board should not have ruled that, because he had committed a "particularly serious crime," he was *ipso facto* "a danger to the community of the United States," and that the Board was required, in addition, to find in this particular case that petitioner was a danger to the community of the United States.[3]

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[3] In *In re Carballe*, 19 I. & N. Dec. 357, 360 (B.I.A. 1986), the Board rejected the argument that it must separately find that an alien who has been convicted of a particularly serious crime also constitutes a danger to the community of the United States.

For several reasons, this contention does not warrant this Court's review. First, it is far from clear that, in this case, the Fourth Circuit actually affirmed the Board's rule that an alien's conviction for a particularly serious crime also necessarily means that the alien presents a danger to the community of the United States. As petitioner points out (Pet. 4), the Fourth Circuit is expected to address this issue in *Kofa* v. *INS*, No. 92-1246, which was argued to the en banc court on March 8, 1994. The fact that the issue is still pending before the court of appeals suggests that the panel did not intend to decide the issue in its cursory discussion of petitioner's claim in its unpublished opinion in this case. The panel's opinion merely states that the Board's determination that petitioner constituted a danger to the community was supported by substantial evidence.

Second, even if we assume that the Fourth Circuit did decide the issue in this case, review would still be unwarranted because there is no conflict among the courts of appeals on the issue. The three other courts of appeals that have considered the matter have all upheld the Board's determinations that 8 U.S.C. 1253(h)(2)(B) disqualifies aliens convicted of "particularly serious crime[s]" from withholding of deportation because those aliens necessarily present a danger to the community, and that there is no need for a separate factual finding of dangerousness. See *Martins* v. *INS*, 972 F.2d 657, 661 (5th Cir. 1992); *Ramirez-Ramos* v. *INS*, 814 F.2d 1394 (9th Cir. 1987); *Crespo-Gomez* v. *Richard*, 780 F.2d 932 (11th Cir. 1986) (per curiam).

Third, the court of appeals' decision on this issue was an alternative ground for its ultimate conclusion that the Board had properly denied withholding of deportation to petitioner. The court of appeals independently upheld the Board's determination that petitioner was not

entitled to withholding because he had not shown a clear probability of persecution if he were returned to Sri Lanka. See Pet. App. 8a. Because, as we explain below, that finding by the Board was correct and is not worthy of further review, petitioner's challenge to the Board's interpretation of 8 U.S.C. 1253(h)(2)(B) will have no effect on his deportation.

2. Petitioner argues (Pet. 6-9) that he has a well-founded fear of persecution, and that the Board erred in ruling otherwise. This contention is fact-specific, and, in any event, the Board's ruling to the contrary was correct, as the court of appeals concluded. The court noted that petitioner is a member of the majority ethnic group in Sri Lanka, which controls the government in that country, that petitioner had never been mistreated by Sri Lankan authorities, that petitioner had failed to show that militants of the minority Tamil ethnic group knew of his participation in anti-Tamil activities, or had threatened or harmed him personally, and that petitioner's fears of reprisals from Sinhalese militants were not based on race, religion, nationality, social group membership, or political opinion. See Pet. App. 7a. In light of this record, the court of appeals did not err in concluding that substantial evidence supported the Board's conclusion that petitioner was not eligible for either asylum or withholding of deportation. See *ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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